89-A1004

Supreme Court, U.S.
FILED
DEC 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ALFONSO ALLOCATI,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION TWO

JOSEPH T. VODNOY
JOSEPH F. WALSH
Attorneys at Law
316 West Second Street
Suite 1200
Los Angeles, CA 90012
(213) 627-1736

Attorneys for Petitioner
ALFONSO ALLOCATI

QUESTIONS PRESENTED

1. Whether a visitor to a residence which is being searched by the police pursuant to a search warrant may be detained, absent some individualized suspicion connecting that person to the illegal activity?

2. Whether a visitor to a residence, which is being searched by the police pursuant to a search warrant, may be subjected to a pat-down search, absent some individualized suspicion that the visitor is armed?

TOPICAL INDEX

	Page
PETITION	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS.	2
STATEMENT OF THE FACTS	3
REASONS FOR GRANTING THIS WRIT	
I. A VISITOR TO A RESIDENCE, WHICH IS BEING SEARCHED BY THE POLICE PURSUANT TO A SEARCH WARRANT, MAY NOT BE DETAINED ABSENT SOME INDIVIDUALIZED SUSPICION CONNECTING THAT PERSON TO THE ILLEGAL ACTIVITY.. . .	5
II. A VISITOR TO A RESIDENCE, WHICH IS BEING SEARCHED BY THE POLICE PURSUANT TO A SEARCH WARRANT, MAY NOT BE SUBJECTED TO A PAT-DOWN SEARCH ABSENT SOME INDIVIDUALIZED SUSPICION THAT THE VISITOR IS ARMED.	9
CONCLUSION.	13

TABLE OF AUTHORITIES

CASES:	Page
Lippert v. State 664 S.W.2d712 (Tex.1984)	6
Michigan v. Summers 452 U.S. 692 (1981)	6
People v. Myles 50 Cal.App.3d 423 (1975)	5
People v. Schwind 211 Cal.App.3d 615 (1989)	6
People v. Superior Court 7 Cal. 3d 186 (1972)	5
State v. Broadnax 654 P.2d 96 (Wash. 1982)	6
State v. Carrasco 711 P.2d 1231 (Ariz. 1985)	6
Terry v. Ohio 392 U.S. 1 (1968)	11
United States v. Clay 640 F.2d 157 (8th Cir. 1981)	6
United States v. Cortez 449 U.S. 411 (1981)	12
Ybarra v. Illinois 444 U.S. 85 (1979)	9
CONSTITUTION:	
United States Constitution, Fourth Amendment	2

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ALFONSO ALLOCATI,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION TWO

The Petitioner, ALFONSO ALLOCATI, prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Two, entered in the above-entitled case on July 7, 1989. A petition for review was denied by the Supreme Court of California on October 26,

1989.

OPINIONS BELOW

The Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, is reported and is attached as Appendix "A" hereto. The order denying the petition for review in the California Supreme Court is attached as Appendix "B" hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., section 1254.

CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the People to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized.

STATEMENT OF THE FACTS

The Petitioner, Alfonso Allocati, was convicted of the crime of possession for sale of cocaine in violation of California Health and Safety Code, section 11351. He appealed the denial of his motion to suppress evidence brought on the grounds that the cocaine was seized by the police in violation of the Fourth Amendment. The California Court of Appeal affirmed. The California Supreme Court denied a petition for review.

The facts concerning the seizure of the cocaine are as follows. On May 22, 1986, Petitioner Allocati was carrying a brown paper bag and a black purse as he approached a residence at which Glendale police officers were executing a search

warrant for narcotics. Officer Kendall Chou secured the front of the residence and asked Petitioner his destination as Petitioner approached. When he stated he was visiting the residence, Officer Chou asked him to place the objects he was carrying to the ground. The officer conducted a pat-down search to insure safety and asked permission to look in the bag. Petitioner picked up the purse and started to open it. The officer feared a weapon, and grabbed the purse, looked in it and observed a large amount of currency. Officer Chou then summoned Officer Joe Jiminez, an experienced narcotics officer, who looked into the open paper bag and saw various items related to drug sales, including a plastic bag containing 110 grams of cocaine. Petitioner was then arrested and the cocaine was seized as evidence.

REASONS FOR GRANTING THIS WRIT

I

A VISITOR TO A RESIDENCE, WHICH IS BEING SEARCHED BY THE POLICE PURSUANT TO A SEARCH WARRANT, MAY NOT BE DETAINED ABSENT SOME INDIVIDUALIZED SUSPICION CONNECTING THAT PERSON TO THE ILLEGAL ACTIVITY

In the Petitioner's case, the state court held that a mere visitor to a residence, that is being searched by the police pursuant to a search warrant, may be (1) detained by the police and (2) subjected to a pat-down search. In so holding, the Court stated:

> Appellant's contention that the cocaine was in plain view due to unlawful police conduct is without merit. Officer Chou acted properly in having appellant place the purse and bag on the ground while he conducted the pat-down search for officer safety. It was not unreasonable for him to suspect a visitor to a location of illicit drug activity might be armed. (People v. Myles (1975) 50 Cal.App.3d 423, 430; cf. People v. Superior Court (1972) 7 Cal. 3d 186, 204) (Slip Opinion pp.2-3).

On the first issue, the great weight of authority supports the conclusion that a mere visitor to a residence while it is being searched may not be legally detained on the basis of his mere presence alone. See, United States v. Clay, 640 F.2d 157 (8th Cir. 1981); State v. Broadnax, 654 P.2d 96 (Wash. 1982); Lippert v. State, 664 S.W. 2d 712 (Tex. 1984); State v. Carrasco, 711 P.2d 1231 (Ariz. 1985); People v. Schwind, 211 Cal.App.3d 615 (1989).

Further support for Petitioner's argument exists in this Court's decision in Michigan v. Summers, 452 U.S. 692 (1981). In Summers, this Court held that while the police are executing a search warrant at a house for narcotics, they may lawfully detain the occupants of the house while the search is conducted. In Summers, the defendant was detained after

descending the front steps of a residence that was about to be searched pursuant to a lawfully issued search warrant. After discovering narcotics in the house, the police returned to where the defendant was detained and arrested him. They found further narcotics on his person. The Court held that the detention was lawful and that the evidence found on his person was admissible. In Michigan v. Summers, supra the Court stated "If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home. Thus, for Fourth Amendment purposes, we hold that a warrant to search for contraband found on probable cause implicitly carried

with it the limited authority to detain the occupants of the premises while a proper search is conducted." (69 L.Ed.2d at 351).

Summers teaches that an occupant's control over and connection to a residence subject to a search warrant gives rise to a reasonable suspicion the occupant is involved in the criminal activity occurring in his or her home. The same cannot be said of a visitor absent some individualized suspicion connecting that person to the suspected illegal activity. In the instant case, there were no facts known to the police officers present that support a reasonable suspicion connecting Petitioner to the illegal activity occurring in the searched premises. Thus, the facts known to the police were not sufficient to warrant a detention of the Petitioner.

II

A VISITOR TO A RESIDENCE, WHICH IS BEING SEARCHED BY THE POLICE PURSUANT TO A SEARCH WARRANT, MAY NOT BE SUBJECTED TO A PAT-DOWN SEARCH ABSENT SOME INDIVIDUALIZED SUSPICION THAT THE VISITOR IS ARMED

The Court of Appeal in the instant case held that it was not unreasonable to conduct a pat-down search of a mere visitor to a residence being searched by police officers with a warrant. Such a conclusion, however, is in direct conflict with the United States Supreme Court decision in Ybarra v. Illinois, 444 U.S. 85 (1979).

In Ybarra v. Illinois, supra, the police obtained a search warrant for a local bar on the basis of an informant's statement that the bartender was trafficking in drugs. When the police entered the bar with the search warrant, the defendant, who was a mere customer at the bar, was detained by the police while the police conducted their search of the bar. In

addition to detaining the defendant, the police also conducted a pat-down search of the defendant. The police officer felt a cigarette pack with objects in it in the defendant's pocket. After the pat-down search, the officer removed the pack from the defendant's pocket and discovered heroin inside the cigarette pack.

The United States Supreme Court held that the search of the defendant was unlawful and ultimately suppressed the heroin taken from the defendant's pocket. The prosecution argued that the defendant was properly subjected to a pat-down search and thereafter they had probable cause to seize the cigarette pack. The United States Supreme Court held that there was no justification for the pat-down search because the police had no reasonable basis for concluding that the defendant was armed and dangerous. In so holding, the Court

stated:

> The initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a pat-down of a person for weapons.
>
> ...[T]he state was unable to articulate any specific fact that would have justified a police officer at the scene even suspecting that Ybarra was armed and dangerous. (444 U.S. at 92-94)

In Terry v. Ohio, 392 U.S. 1, 27 (1968), the Court held that a police officer could undertake a pat-down search only "where [the officer] has reason to believe that he is dealing with an armed and dangerous individual.... The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others is in danger." The Court also stated that "In determining whether an officer acted reasonably in such

circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch', but to the specific reasonable inference which he is entitled to draw from the facts." Id.

To uphold the pat-down search of the Petitioner Allocati in this case is to sanction a Terry weapons search based on nothing more than generalized suspicions concerning a person's involvement in narcotics activities. Blanket generalizations about the nature of certain crimes, however, fail to provide that specificity of information which is the hallmark of Fourth Amendment jurisprudence. United States v. Cortez, 449 U.S. 411, 418 (1981); Terry, 392 U.S. at 21, n.18.

CONCLUSION

Based upon the foregoing, the Petitioner urges that this Petition be granted.

Respectfully submitted,

JOSEPH T. VODNOY

JOSEPH F. WALSH

Attorneys for Petitioner
ALFONSO ALLOCATI

APPENDIX "A"

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	) No. B032570
Plaintiff and Respondent,	) (Super.Ct.No. A592547)
v.	)
ALFONSO ELVAO ALLOCATI,	)
Defendant and Appellant.	)
	) [Filed July 7,1989]

Alfonso Elvao Allocati appeals from the judgment entered following his plea of guilty to possession of cocaine for sale after denial of a motion to suppress evidence. (Health & Saf. Code, §1538.5). He contends: "The court erred in denying the appellant's motion to suppress the cocaine found in the paper bag because the evidence came into plain view as a result of the unlawful police conduct of ordering the appellant to place the bag on the

ground."

Viewing the evidence in accordance with the customary standard of appellate review (People v. Leyba (1981) 29 Cal.3d 591, 596-597), it was established that on May 22, 1986, appellant was carrying a brown paper bag and a black purse as he approached a residence at which Glendale police officers were executing a search warrant for narcotics. Officer Kendall Chou secured the front of the residence and asked appellant his destination as appellant approached. When he stated he was visiting the residence, Officer Chou asked him to place the objects he was carrying on the ground. The officer conducted a pat-down search to insure safety and asked permission to look in the bag. Appellant picked up the purse and started to open it. The officer feared a weapon, and grabbed the purse,

looked in it and observed a large amount of currency. Officer Chou then summoned Officer Joe Jiminez, an experienced narcotics officer, who looked into the open paper bag and saw various items related to drug sales, including a plastic bag containing 110 grams of cocaine.

Appellant's contention that the cocaine was in plain view due to unlawful police conduct is without merit. Officer Chou acted properly in having appellant place the purse and bag on the ground while he conducted the pat-down search for officer safety. It was not unreasonable for him to suspect a visitor to a location of illicit drug activity might be armed. (People v. Myles (1975) 50 Cal. App.3d 423, 430; cf. People v. Superior Court (1972) 7 Cal. 3d 186, 204.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

_____ P.J.
ROTH

We concur:

_____, J.
GATES

_____, J.
FUKUTO

APPENDIX "B"

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division Two

No. B032570, S011572

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent,

v.

ALFONSO ELVAO ALLOCATI, Appellant.

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed July 7, 1989, which appears at 212 Cal.App. 3d 392. (Cal.Const., Art.VI, Section 14; Rule 976, Cal. Rules of Court).

LUCAS
Chief Justice